FILED BY CLERK
JUNE 26 2008
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

	)	2 CA-JV 2008-0014
	)	DEPARTMENT A
	)	
IN RE PATRICK C.	)	MEMORANDUM DECISION
	)	Not for Publication
	)	Rule 28, Rules of Civil
	)	Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 18190201

Honorable Joan L. Wagener, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for State

Benavidez Law Group, P.C.
By Lawrence Y. Gee
Tucson
Attorneys for Minor

H O W A R D, Presiding Judge.

¶1 Patrick C., a minor, was adjudicated delinquent for having committed aggravated assault upon a corrections officer at the Catalina Mountain School. Following

the juvenile court's disposition order, he appealed. He argues the juvenile court erred by allowing the state to amend the allegation in the delinquency petition to conform to the evidence presented at the adjudication hearing. We affirm.

¶2 In the delinquency petition, the state alleged that Patrick, "a prisoner," had committed aggravated assault upon a corrections officer by assaulting the victim, "an employee of Catalina Mountain School/ADJC, in violation of A.R.S. §§ 13-1204(A)(7) and (B)." At the time the petition was filed, however, subsection (A)(7) provided that a person commits aggravated assault by

> knowingly tak[ing] or attempt[ing] to exercise control over any weapon other than a firearm that is being used by a peace officer or other officer or that the officer is attempting to use, and the person knows or has reason to know that the victim is a peace officer or other officer employed by one of the agencies listed in paragraph 10 subdivision (a), . . . of this subsection and is engaged in the execution of any official duties.

2005 Ariz. Sess. Laws., ch. 166, § 3. Section 13-1204(A)(10) provided, as it does now, that a person in the custody of certain agencies, including the department of juvenile corrections, commits aggravated assault by assaulting an employee of that agency or another contracting agency "knowing or having reason to know that the victim is acting in an official capacity."

¶3 The state presented no evidence at the adjudication hearing that a weapon was involved in the incident in question, and the prosecutor apparently became aware of what he described as a scrivener's error in the delinquency petition when, after the close of the state's evidence, Patrick moved for a judgment of acquittal. The state moved to amend the

petition to correct the statutory citation. The juvenile court granted the state's motion over Patrick's objection, determining that Patrick had been "on notice" of the charge against him, that there been a "technical defect in the citation," and that Patrick had suffered no prejudice.

¶4 A delinquency petition must "set forth" with "concise language [and] reasonable particularity . . . the alleged acts of the juvenile and the law or standard of conduct allegedly violated by such acts." Ariz. R. P. Juv. Ct. 24(A)(1). "A petition may be amended by order of the court in response to the motion of any party at any time before adjudication, provided the parties are granted sufficient time to meet the new allegations." Ariz. R. P. Juv. Ct. 24(B). A "charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the juvenile consents to the amendment," and "[t]he charging document shall be deemed amended to conform to the evidence presented at any court proceeding." Ariz. R. P. Juv. Ct. 29(D)(1).

¶5 In the analogous context of motions to amend criminal indictments,[1] our supreme court has "note[d] . . . that the trial court is invested with considerable discretion in resolving such motions." *State v. Sammons*, 156 Ariz. 51, 54, 749 P.2d 1372, 1375 (1988). "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980). "In determining whether the offense was changed or the defendant prejudiced," a reviewing court considers whether the amendment violated a defendant's "right to 'notice of the charges'" and whether the defendant had an "ample opportunity to prepare to defend against them.'" *State v. Johnson*, 198 Ariz. 245, 248, 8 P.3d 1159, 1162 (App. 2000), *quoting State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982).

¶6 In *State v. Sustaita*, 119 Ariz. 583, 591, 583 P.2d 239, 247 (1978), the supreme court characterized an incorrect statutory citation to the crimes alleged as "a technical or formal defect which was clearly amendable upon the State's motion under Rule

---

[1]A criminal "charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment. The charging document shall be deemed amended to conform to the evidence adduced at any court proceeding." Ariz. R. Crim. P. 13.5(b). "The amendment process is governed by the same Sixth Amendment principles applicable to the original charge," including notice and opportunity to prepare a defense, and "a proposal to amend will be rejected if its substance or timing is such as to undermine or defeat the interest in a fair trial that the Amendment is designed to protect." *State v. Sanders*, 205 Ariz. 208, ¶¶ 16-17, 68 P.3d 434, 439-40 (App. 2003); *see also In re Gault*, 387 U.S. 1, 33 (1967) (applying constitutional notice principles to juvenile proceedings).

13.5(b)." There, the indictment had charged the defendants with assaulting "[the victim] with intent to commit the infamous crime against nature all in violation of A.R.S. § 13-253"; the correct citation for the crime, however, was A.R.S. § 13-252. *Sustaita*, 119 Ariz. at 591, 583 P.2d at 247. The defect came to light on the first day of trial, and the defendants moved to dismiss the applicable counts as "fatally defective." *Id*. The trial court denied the motion to dismiss and instead granted the state's motion to amend the indictment. *Id*. The supreme court affirmed, noting the defendants had had "ample notice of the charge" against them and had shown "no prejudice." *Id*.

¶7 In *State v. Noriega*, 142 Ariz. 474, 482-83, 690 P.2d 775, 783-84 (1984), *overruled on other grounds by State v. Burge*, 167 Ariz. 25, 28 n.7, 804 P.2d 754, 757 n.7 (1990), the supreme court approved a post-trial amendment correcting a citation from A.R.S. § 13-604.01(B) to A.R.S. § 13-601.01(A). The court stated that "the nonprejudicial misdesignation of a statutory subsection alone" was insufficient "to constitute reversible error" and explained that, "[i]f there is an arguably sufficient, but erroneous, allegation in the indictment, the controlling inquiry is whether there was any surprise or prejudice to the defendant." *Noriega*, 142 Ariz. at 483, 690 P.2d at 784.

¶8 In this case, the factual description of Patrick's conduct clearly fell under § 13-1204(A)(10), not under subsection (A)(7). Patrick did not contest the state's assertion that "none of [its pre-trial] disclosure indicated that a weapon [had been] involved," and no witness testified that Patrick had attempted to gain control over a weapon. Although Patrick

claims on appeal that "all parties [had] proceeded according to [the charge under subsection (A)(7)] until nearly the end of trial," nothing in the record indicates the state ever attempted to prove anything other than a violation of subsection (A)(10).

¶9 This was not a case in which the state "chang[ed] its mind in the middle of trial" about its theory of the case or, having failed to prove the elements of the offense charged, attempted to charge another. *State v. Sanders*, 205 Ariz. 208, ¶¶ 31-32, 44, 68 P.3d 434, 444 (App. 2003) (original charge of assault "committed by a knowing touching with the intent to injure, insult, or provoke" inappropriately amended to "specif[y] that the defendant [had] intentionally placed the [victim] in reasonable apprehension of imminent physical injury"); *see also Gray v. Raines*, 662 F.2d 569, 572-73 (9th Cir. 1981) (habeas corpus action originating in Arizona state court; charge of forcible rape where age of victim irrelevant and consent defense inappropriately amended to allege statutory rape where victim's age was relevant and consent unavailable as defense). Moreover, Patrick's counsel declined the juvenile court's offer to allow her to "further cross examine the witnesses" or "set [the adjudication hearing] off for a period of time if" Patrick claimed prejudice in light of the proposed amendment.

¶10 We find no abuse of discretion in the juvenile court's determination that Patrick had had adequate notice of the charge against him and would suffer no prejudice as a result of the amendment. The court properly characterized the misdesignation of Patrick's

offense as a formal or technical defect, and it did not abuse its discretion in allowing the state's proposed amendment. The adjudication and disposition orders are affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge